A

MAZNI IBRAHIM

v.

ROSAIDY EFFANDY
(TETUAN KHAIRIL & CO)

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
ABDUL WAHAB PATAIL JCA
ROHANA YUSUF J
C [CIVIL APPEAL NO: B-02-1495-07/2012]
28 DECEMBER 2012

CIVIL PROCEDURE: *Appeal - Appeal record - Failure to serve draft record of appeal before filing in court - Whether appeal fundamentally*
D *defective - Whether appeal ought to be struck off - Whether client suffered from negligence or mistake of previous solicitor - Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, rr. 4 and 5*

EVIDENCE: *Documentary evidence - Admissibility of - Application*
E *seeking leave to admit additional documents at hearing of appeal - Last minute applications - Whether allowed*

The respondent, a solicitor in the legal firm of Messrs Khairil & Co, was appointed to defend the appellant in an originating summons application against her in the High Court. The appellant
F claimed that the respondent had committed various types of misconduct in the conduct of her case. Her complaint to the disciplinary board ('the DB') was dismissed. Unhappy with the decision of the DB, the appellant appealed to the High Court through her new solicitors, Tetuan Adnan Sharida & Associates
G ('TASA'). By way of this appeal, the appellant applied for the decision of the DB to be set aside. However, at the hearing of the appeal, a preliminary objection was raised on the grounds of non-compliance with rr. 4 and 5 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 ('the Rules'), which
H would render the motion defective and incompetent. The High Court dismissed the appellant's appeal because the appellant had not only failed to file an appeal record within the time allowed by the Rules but also failed to file any record of appeal and to serve the same on the respondent, the DB and the Bar Council without
I providing any explanation for her non-compliance with rr. 4 and 5 of the Rules. Thus, the appellant appealed against the decision of

the High Court. The appellant submitted that the failure to comply with rr. 4 and 5 of the Rules was occasioned by the negligence or mistake of her solicitor, TASA. Without commencing any litigation against TASA, the appellant filed the memorandum of appeal through her present solicitors, Tetuan Noorazmir Khadijah & Associates ('NKA'). In addition, the appellant filed an application seeking leave to file and serve three additional documents at the hearing of the appeal. At the appeal hearing, the respondent raised the objection that the record of appeal filed in this appeal should be struck out and the appeal be dismissed on the grounds that (i) the draft record was not served upon the respondent before it was filed; (ii) that the record contained a submission that and the respondent denied making. The respondent also objected to the proposed additional documents on the grounds that there were email communications between the appellant and her previous solicitor that had nothing to do with the case.

Held (dismissing application and appeal with costs)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The filing of the application seeking leave to file and serve additional documents at the hearing of the appeal was a last minute application. Such practice of entertaining last minute applications would cause dates of hearing to be vacated and also erode discipline in the hearing and disposal of appeals before the courts, thereby leading to the creation of a backlog. Further, the fact that no civil action was undertaken against the solicitor, who was allegedly negligent, threw much doubt upon the value of the emails that the appellant sought to include at this hearing. (paras 17 & 18)

(2) The failure to serve the draft record of appeal upon the respondent before it was filed was a fundamental threat to the reliability of the record of appeal before the appellate courts. Without a record of appeal filed, the appeal was fundamentally defective. In the present case, the record of appeal filed in the High Court was incomplete, while the record of appeal in the present appeal suffered from the fundamental defect of the draft not having been served upon the respondent and containing a submission which the latter denied making. Hence, it was not made possible to show where the merits and justice lay. (paras 19, 20 & 23)

(3) The principles of finality in litigation and that the solicitor was the agent of the client would mean that the general principle that a client should not suffer from the negligence or mistake of the solicitor was confined to a limited application where the injustice was one that could not be remedied by an action against the errant solicitor. Otherwise, it would become common practice to obtain a second bite of the cherry by changing counsel, and blaming the errors in the first action upon the previous solicitor without any civil suit being commenced and maintained against that previous solicitor. This would make a mockery of the system of justice. (paras 26, 27 & 29)

Bahasa Malaysia *Translation Of Headnotes*

Responden, seorang peguam di firma Messrs Khairil & Co, telah dilantik sebagai peguamcara perayu bagi permohonan saman pemula yang difailkan terhadap perayu di Mahkamah Tinggi. Perayu mendakwa bahawa responden telah melakukan beberapa salah laku ketika mengendalikan kesnya. Walau bagaimanapun aduan perayu kepada Lembaga Disiplin ('LD') terhadap responden telah ditolak. Tidak berpuas hati dengan keputusan LD, perayu merayu ke Mahkamah Tinggi melalui peguamcaranya yang baru, Tetuan Adnan Sharida & Associates ('TASA'). Melalui rayuannya, perayu memohon agar keputusan LD diketepikan. Walau bagaimanapun, ketika pendengaran rayuan, satu bantahan awal telah dibangkitkan atas alasan ketidakpatuhan terhadap peruntukan kk. 4 dan 5 Kaedah-Kaedah Profesion Undang-Undang (Prosiding Disiplin) (Rayuan) 1994 ('Kaedah'), ketidakpatuhan yang mana boleh menyebabkan usul menjadi cacat dan tidak kompeten. Mahkamah Tinggi menolak rayuan perayu kerana perayu bukan sahaja gagal memfailkan rekod rayuan dalam masa yang ditetapkan Kaedah, tetapi juga gagal memfailkan sebarang rekod rayuan dan menyerahkannya kepada responden, LD dan Majlis Peguam, serta gagal memberikan apa-apa penjelasan mengenai ketidakpatuhannya terhadap kk. 4 dan 5 Kaedah tersebut. Perayu merayu terhadap keputusan Mahkamah Tinggi sekaligus menghujahkan bahawa kegagalan mematuhi kk. 4 dan 5 Kaedah adalah akibat daripada kecuaian atau kekhilafan TASA, peguamcaranya. Perayu walau bagaimanapun tidak memfailkan apa-apa tindakan terhadap TASA, dan telah memfailkan memorandum rayuan ini melalui peguamcaranya yang terbaru, iaitu Tetuan Noorazmir Khadijah & Associates

('NKA'). Perayu juga telah memfailkan permohonan untuk kebenaran memfailkan tiga dokumen tambahan dalam rayuan ini. Ketika pendengaran, responden membangkitkan bantahan bahawa rekod rayuan yang difailkan dalam rayuan ini harus dibatalkan atas alasan-alasan (i) bahawa deraf rekod tidak diserahkan kepadanya sebelum ianya difailkan dan (ii) rekod tersebut mengandungi pengataan yang dinafikan oleh responden. Responden juga membantah dokumen tambahan yang dicadangkan atas alasan bahawa ia adalah komunikasi email antara perayu dan peguamcara terdahulunya tidak ada kaitan dengan kes.

Diputuskan (menolak permohonan memfailkan dokumen tambahan dan rayuan dengan kos)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Pemfailan permohonan bagi memohon kebenaran untuk memfailkan dokumen tambahan ketika pendengaran rayuan adalah satu permohonan yang dibuat pada saat-saat akhir. Amalan melayan permohonan-permohonan pada saat-saat akhir akan menyebabkan tarikh pendengaran terpaksa dikosongkan dan akan mengikis disiplin dalam pendengaran dan pelupusan rayuan-rayuan di mahkamah sekaligus menyebabkan tunggakan kerja. Selain itu, fakta bahawa tiada tindakan sivil diambil terhadap peguamcara, yang dikatakan berlaku cuai, membangkitkan banyak keraguan terhadap nilai email yang hendak dikemukakan perayu di pendengaran ini.

(2) Kegagalan menyerahkan deraf rekod rayuan kepada responden sebelum ianya difailkan menjejaskan kebolehterimaan rekod rayuan di hadapan mahkamah peringkat rayuan. Tanpa rekod rayuan difailkan, rayuan adalah pada asasnya cacat. Dalam kes ini, rekod rayuan yang difailkan di Mahkamah Tinggi adalah tidak sempurna, sementara rekod rayuan dalam rayuan ini pula mengalami kecacatan besar disebabkan deraf tidak diserahkan kepada responden serta mengandungi hujahan yang responden menafikan dibuat olehnya. Oleh itu, tiada apa yang boleh menunjukkan di mana letaknya merit permohonan dan keadilan kes.

A **(3)** Prinsip kemuktamadan perbicaraan dan bahawa peguamcara adalah wakil anak guam bermakna bahawa prinsip am seorang anak guam tidak harus dihukum kerana kecuaian atau kekhilafan peguamcaranya hanya terpakai kepada keadaan yang terhad, iaitu di mana ketidakadilan tidak boleh diremedi melalui B tindakan terhadap peguamcara yang bersalah. Jika tidak, ia akan menjadi amalan biasa untuk memperoleh peluang kedua dengan menukar peguamcara, dan menyalahkan peguamcara terdahulu atas kesilapan tindakan pertama, walaupun dengan tidak memfailkan sebarang tindakan sivil terhadap peguamcara C terdahulu tersebut. Ini samalah seperti mempermainkan sistem keadilan.

Case(s) referred to:
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ D *329 FC* ***(refd)***

Legislation referred to:
Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, rr. 4, 5
Rules of the Court of Appeal 1994, r. 3A
E Rules of the High Court 1980, O. 1A

For the appellant - Noorazmir Zakaria; M/s Noorazmir, Khadijah & Assocs
For the respondent - Yusman Che Aman; M/s Khairil & Co

[Appeal from High Court Malaya, Shah Alam; Originating Motion No: 25-10-01/2012] F

Reported by Vani Krishnan

G

JUDGMENT

Abdul Wahab Patail JCA:

[1] This is an appeal by the appellant Mazni binti Ibrahim from the decision of the High Court at Shah Alam.

H

At The High Court

[2] The appellant had applied by originating motion at the High Court for orders as follows:

I (i) Bahawa keputusan Lembaga tatatertib Peguam-Peguam bertarikh 9 Disember 2011 menolak aduan pihak Pemohon dibawah Seksyen 103D Akta Profession Guaman 1976 hendaklah diketepikan;

(ii) Responden telah melakukan salahlaku semasa mengendalikan kes yang melibatkan Pemohon di dalam tindakan Saman Pemula No: MT3-24-1872-2008;

(iii) Kos permohonan ini dibayar oleh Responden; dan

(iv) Lain-lain relif Yang Mahkamah Yang Mulia ini fikirkan adil dan suaimanfaat.

[3] The grounds for the application were set out as follows:

(i) Saya telah nasihati oleh peguamcara saya dan sesungguhnya percaya bahawa Lembaga Tatatertib Peguam-Peguam telah terkhilaf dalam mencapai satu keputusan menolak Aduan tersebut apabila gagal mengambil kira fakta-fakta dan dokumen sokongan yang disertakan bersama Aduan tersebut yang jelas menunjukkan wujudnya salahlaku oleh Responden.

(ii) Saya akan merujuk mahkamah yang mulia ini kepada Aduan tersebut dan segala penyataan saya serta dokumen-dokumen yang dimasukkan bersama Aduan tersebut bagi menunjukkan bahawa sememangnya wujud salahlaku oleh Responden.

(iii) Saya menyatakan bahawa Responden telah melakukan kesalahan seperti dalam aduan saya dan saya tidak bersetuju dengan keputusan Lembaga Tatatertib Peguam-Peguam tersebut.

[4] In addition to the Originating Motion, the appellant had filed for the hearing:

(i) An affidavit in support dated 18 January 2012 by the applicant; and

(ii) Written submissions for the application.

[5] A preliminary objection was raised on the ground of non compliance with rr. 4 and 5 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, thereby rendering the motion defective and incompetent.

[6] The High Court dismissed the motion. We examined the grounds of judgment. Paragraphs 3, 4, 5 and 5 of the grounds of judgment of the High Court show that the dismissal was upon the preliminary objection because the applicant had not only failed to file an appeal record within the time allowed by the Rules but also failed to file any record of appeal and to serve the same on the

respondent, the Disciplinary Board and the Bar Council. There was also no application to file the record of appeal out of time and there was no explanation given for non compliance with rr. 4 and 5.

[7] In the alternative, assuming it was wrong in holding there was non compliance with rr. 4 and 5, the High Court considered the motion, the affidavit in support and the written submission. It found that:

> [8] Dari butiran yang diberikan oleh pemohon tersebut yang telah menjadi ketidakpuasan hati pemohon ke atas keputusan Lembaga Tatatertib Peguam-Peguam yang telah menolak pengaduan pemohon, mahkamah ini berpendapat salahlaku tersebut lebih menjurus kepada isu tanggungjawab professional oleh responden selaku peguamcara dalam pengendalian kes pemohon dan tidak boleh menjurus kepada satu salahlaku disiplin. Pemohon mungkin mempunyai remedi lain bagi melindungi haknya terhadap kegagalan tanggungjawab responden.

[8] The High Court came to this conclusion because the particulars of misconduct set out in support of the originating motion were:

> (i) Tidak menunjukkan dokumen-dokumen penting kepada anakguam;
>
> (ii) Menyembunyikan maklumat daripada anakguam;
>
> (iii) Tidak memberitahu akan kewujudan affidavit pembetulan bertarikh 6.2.2009 sebelum perbicaraan tindakan utama tersebut pada 20.2.2009;
>
> (iv) Tidak menasihatkan anakguam untuk menuntut kos dari pihak plaintif tersebut apabila plaintif tersebut menarik balik permohonan untuk Injunksi *Erinford*;
>
> (v) Dan pelbagai lagi salah laku.

[9] Not satisfied with the dismissal of the notice of motion, the appellant filed an appeal to this court.

Enclosure 8a Before This Court

[10] The date 24 October 1012 was the hearing date of the appeal before this court. Following directions given, the written submission for the respondent was filed by both parties on

10 October 2012. But on the same day, a notice of motion at encl. 8a dated 10 October 2012 was also filed for the appellant to include in the record of appeal: A

(i) A copy of an email from the appellant's previous solicitors Encik Adnan Seman @ Abdullah of Tetuan Adnan Sharida & Associates dated 8 August 2012; B

(ii) A copy of an email from the appellant's previous solicitors Encik Adnan Seman @ Abdullah of Tetuan Adnan Sharida & Associates dated 12 July 2012, 18 July 2012, 24 July 2012 and 2 August 2012; and C

(iii) Written submissions for the respondent dated 10 May 2012 (pp. 49 - 59 Rekod Rayuan (Jilid 1) Bahagian B).

[11] In addition, the appellant sought leave with liberty to file and serve the additional record of appeal within 14 days, or alternatively for leave to refer and to use the three documents at the hearing of the appeal. D

[12] Although he had no objection to the notice of motion at encl. 8a being heard on the day of hearing, counsel for the respondent objected to the proposed additional record of appeal on the grounds that those are communication between the appellant and her previous solicitor and had nothing to do with the case. Furthermore, those documents were with the appellant at all times. E F

[13] We examined the grounds laid out in encl. 8a, the affidavit in support, and in the submissions before dismissing the application. In setting out our reasons, we first set out the material parts of these documents. G

[14] The grounds set out in the application at encl. 8a were:

> (i) Email-email yang ingin dimasukkan sebagai dokumen tambahan di dalam Rekod Rayuan tersebut merupakan bukti bahawa berlakunya kecuaian di pihak Peguamcara Perayu yang terdahulu dalam mengendalikan kes ini di Mahkamah Tinggi hingga menyebabkan Usul Pemula Perayu bertarikh 19/1/2012 telah ditolak oleh Mahkamah Tinggi akibat daripada kegagalan Peguamcara Perayu yang terdahulu memfailkan Rekod Rayuan sepertimana yang diperuntukkan di dalam Kaedah 4 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994. H I

A (ii) Email daripada Peguamcara Perayu yang terdahulu iaitu Encik Adnan Seman @ Abdullah dari Tetuan Adnan Sharida & Associates bertarikh 8/8/2012 tersebut dengan jelas menyatakan pengakuan bersalah Peguamcara Perayu yang terdahulu akibat daripada kegagalan mematuhi Kaedah 4 Legal Profession (Disciplinary Proceedings) (Appeal) Rules B 1994 tersebut.

(iii) Perayu percaya bahawa permohonan ini tidak memprejudiskan dan/atau menjejaskan keadilan kepada pihak-pihak kerana email-email ...;

C (iv) Perayu percaya bahawa Perayu mempunyai tuntutan yang munasabah dan merit kes yang kukuh dalam kes ini;

(v) Perayu percaya bahawa Mahkamah Tinggi Shah Alam telah tersilap dari segi undang-undang dan/atau fakta apabila memutuskan bahawa permohonan Perayu adalah cacat dan D fatal di atas ketidakpatuhan Kaedah 4 dan Kaedah 5 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut, sedangkan Perayu tidak diberi peluang untuk melantik Peguamcara yang baru bagi menggantikan Peguamcara Perayu yang terdahulu yang ternyata telah cuai E dalam mematuhi Kaedah 4 dan Kaedah 5 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut;

(vi) Perayu percaya bahawa Mahkamah Tinggi Shah Alam telah tersilap dari segi undang-undang dan/atau fakta apabila memutuskan bahawa permohonan Perayu adalah cacat dan F fatal di atas ketidakpatuhan Kaedah 4 dan Kaedah 5 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut, sedangkan ketidakpatuhan tersebut boleh diperbaiki dan tindakan boleh diambil bagi mematuhi peraturan tersebut melalui pemfailan permohonan bagi memfailkan dan G menyerahkan Rekod Rayuan di luar jangkamasa melalui Peguamcara Perayu yang baru;

(vii) Perayu percaya bahawa Mahkamah Tinggi Shah Alam telah tersilap dari segi undang-undang dan/atau fakta apabila memutuskan bahawa permohonan Perayu adalah cacat dan H fatal di atas ketidakpatuhan Kaedah 4 dan Kaedah 5 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 tersebut, sedangkan Perayu tidak harus diprejudiskan untuk mendapatkan keadilan yang sewajarnya akibat daripada ketidakpatuhan dan kecuaian Peguamcara Perayu yang terdahulu tersebut; I

(viii) Email-email tersebut juga berkait rapat dengan Alasan Rayuan Perayu di dalam Memorandum Rayuan yang telah difailkan di Mahkamah sebelum ini;

(ix) Hujahan Bertulis Responden bertarikh 10/5/2012 (mukasurat 49 - 59 Rekod Rayuan (Jilid 1) Bahagian B) pula sebenarnya telah diberikan oleh Peguamcara Perayu kepada Perayu pada 13/6/2012. Namun, Peguamcara Responden kemudiannya melalui surat bertarikh 27/8/2012 telah menafikan bahawa mereka ada menyediakan Hujahan Bertulis tersebut; dan

(x) Hujahan Bertulis tersebut perlu dijadikan keterangan lanjut kerana ia membuktikan bahawa Perayu sememangnya tidak mempunyai pengetahuan mengenai sebarang bantahan awal oleh Peguamcara Responden ketika Pendengaran kes di Mahkamah Tinggi.

[15] The affidavit in support by the appellant supports the grounds set out above and added:

(i) 11. Berdasarkan kepada pernyataan-pernyataan di atas saya telah dinasihatkan dan sesungguhnya percaya bahawa keputusan Mahkamah Tinggi Shah Alam pada 21/5/2012 perlu diketepi dan dibatalkan di mana merit Usul Pemula Perayu perlu didengar semula dan Perayu perlu diberi kebenaran untuk memfailkan Rekod Rayuan untuk Usul Pemula tersebut di luar jangkamasa.

(ii) 12. Selanjutnya saya menyatakan bahawa peguamcara Responden melalui surat bertarikh 27/8/2012 telah menyatakan bantahan kepada kemasukan Hujahan Bertulis Responden bertarikh 10/5/2012 [mukasurat 49 - 59 Rekod Rayuan (Jilid 1) Bahagian B] di dalam Rekod Rayuan.

Salinan surat peguamcara Responden bertarikh 27/8/2012 dilampirkan di sini dan ditanda sebagai Ekshibit "MI-S**.

(iii) 13. Berikutan bantahan peguamcara Responden, Perayu memfailkan permohonan ini bagi mendapatkan kebenaran Mahkamah Yang Mulia ini di bawah seksyen 69 Akta Mahkamah Kehakiman 1964 dan Kaedah 7 Kaedah-Kaedah Mahkamah Rayuan 1994 untuk membenarkan keterangan lanjut tersebut dirujuk oleh pihak-pihak.

(iv) 14. Saya sesungguhnya percaya bahawa keterangan-keterangan lanjut di perenggan 1(c) Notis Usul yang telah dimasukkan di dalam Rekod Rayuan tidak akan memprejudiskan Responden pada mana-mana takat kerana

dokumen tersebut sebenarnya adalah dokumen yang telah diberikan oleh Peguamcara Perayu yang terdahulu melalui staf beliau iaitu Encik Anuar kepada Perayu pada 13/6/2012.

(v) 15. Saya amat terperanjat apabila Peguamcara Responden melalui surat mereka bertarikh 27/8/2012 tersebut menyatakan bahawa Hujahan Bertulis tersebut adalah dokumen palsu dan tidak pernah wujud.

(vi) 16. Malah, Peguamcara Perayu yang terdahulu kemudiannya melalui surat bertarikh 29/8/2012 turut telah menyatakan bahawa mereka tidak mempunyai pengetahuan mengenai Hujahan Bertulis yang didakwa sebagai palsu tersebut.

Salinan surat daripada Tetuan Adnan Sharida & Associates bertarikh 29/8/2012 dilampirkan di sini dan ditanda sebagai Ekshibit "MI-4".

(vii) 17. Rentetan daripada itu, saya telah menghantar surat saya bertarikh 4/9/2012 kepada Peguamcara Perayu yang terdahulu bagi mendapatkan penjelasan tentang perkara ini memandangkan Hujahan Bertulis tersebut jelas telah diberikan oleh Peguamcara Perayu yang terdahulu kepada saya. Salinan surat saya bertarikh 4/9/2017 dilampirkan di sini dan ditanda sebagai Ekshibit "MI-5".

(viii) 18. Namun, Peguamcara Perayu yang terdahulu melalui email bertarikh 11/9/2012 langsung tidak menjawab setiap butiran yang saya nyatakan di dalam surat saya bertarikh 4/9/2012 tersebut. Sebaliknya, mereka hanya membuat penafian kosong semata-mata tanpa memberikan sebarang penjelasan dan tidak pun menjawab setiap fakta yang saya perincikan di dalam surat saya bertarikh 4/9/2012 tersebut. Salinan email daripada Tetuan Adnan Sharida & Associates bertarikh 11/9/2012 dilampirkan di sini dan ditanda sebagai Ekshibit "MI-6".

(ix) 19. Saya kemudiannya melalui surat bertarikh 13/9/2012 kepada Peguamcara saya yang terdahulu telah menyatakan kekeliruan saya atas tindakan mereka terhadap saya di mana saya turut telah menegaskan pendirian saya bahawa: ...

(x) 20. Saya selanjutnya menyatakan bahawa Peguamcara saya yang terdahulu kemudiannya langsung tidak menjawab kepada surat saya bertarikh 12/9/2012 tersebut.

(xi) 21. Oleh itu, saya percaya bahawa Hujahan Bertulis tersebut perlu dijadikan sebagai keterangan lanjut memandangkan ia adalah bukti bahawa saya sememangnya tidak mengetahui wujudnya bantahan awal oleh Peguamcara Responden di Mahkamah Tinggi. Apatah lagi, Peguamcara Perayu yang terdahulu langsung tidak menjawab setiap butiran yang saya nyatakan di dalam surat saya kepada mereka yang membuktikan bahawa setiap butiran yang saya sebutkan tersebut adalah betul dan tidak dinafikan.

(xii) 22. Justeru, saya telah dinasihati oleh Peguamcara saya dan saya menyatakan bahawa saya tidak harus diprejudiskan atas segala kekeliruan yang timbul akibat daripada tindakan Peguamcara saya yang terdahulu.

[16] It was submitted for the appellant in respect of the emails sought to be added to the record that:

(i) Pemohon/Perayu perlu diberikan kebenaran dan kebebasan untuk memasukkan dokumen (a) Notis Usul ...

(ii) Pemohon/Perayu juga perlu diberikan kebenaran dan kebebasan untuk memasukkan dokumen (b) Notis Usul Pemohon/Perayu ...

(iii) Permohonan ini tidak memprejudiskan dan/atau menjejaskan keadilan kepada pihak-pihak kerana email-email tersebut amat penting dalam membuktikan di Mahkamah yang Mulia ini bahawa kegagalan untuk mematuhi Kaedah 4 dan Kaedah 5 tersebut adalah di luar pengetahuan Perayu dan ia adalah disebabkan oleh kecuaian di pihak Peguamcara Perayu yang terdahulu sepertimana yang diakui sendiri oleh Peguamcara Perayu yang terdahulu melalui email bertarikh 8/8/2012 tersebut setelah Perayu berulangkali meminta Peguamcara Perayu yang terdahulu tersebut memberikan penjelasan atas keputusan Mahkamah Tinggi tersebut.

(iv) Dokumen-dokumen (a) dan (b) Notis Usul tersebut merupakan keterangan lanjut memandangkan ia adalah sebagai bukti kepada perenggan 1 Memorandum Rayuan yang telah difailkan di Mahkamah yang Mulia ini (sila rujuk mukasurat 8 Rekod Rayuan) di mana ia dinyatakan bahawa: "kegagalan untuk mematuhi Kaedah 4 dan Kaedah 5 tersebut adalah di luar pengetahuan Perayu dan ia adalah disebabkan oleh kecuaian di pihak Peguamcara Perayu yang terdahulu. Malah, kecuaian tersebut diakui sendiri oleh Peguamcara Perayu melalui email mereka kepada Perayu bertarikh 8/8/2012

setelah Perayu berulangkali meminta Peguamcara Perayu yang terdahulu tersebut memberikan penjelasan atas keputusan Yang Arif Hakim tersebut".

(v) Perayu tidak harus diprejudiskan untuk mendapatkan keadilan yang sewajarnya akibat daripada ketidakpatuhan dan kecuaian Peguamcara Perayu yang terdahulu tersebut.

(vi) Keputusan Mahkamah Tinggi Shah Alam pada 21/5/2012 perlu diketepi dan dibatalkan di mana merit Usul Pemula Perayu perlu didengar semula dan Perayu perlu diberi kebenaran untuk memfailkan Rekod Rayuan untuk Usul Pemula tersebut di luar jangkamasa.

[17] We dismissed the application at encl. 8a for the following reasons:

(i) The filing of the application on the same date as the date for the filing of the written submissions for the appeal is not merely a filing at the eleventh hour, but it means that the matter of making the application is only attended to at the eleventh hour. Such application is safe to be allowed only if there is no dispute or objection.

(ii) If there are disputes or objection, last minute applications are unsafe to be allowed as it does not give adequate time to the parties to check and verify the truth and correctness thereof. If allowed, it opens the court to the risk of relying upon evidence that are unsafe, thus lowering the quality of justice that can be delivered.

(iii) Such last minute applications if allowed will give endorsement to counsels to attend to a case only at the last minute when it is due to be heard, and then seeking to make corrections and other last minute amendments on the date of hearing itself. If allowed, such a practice of entertaining last minute applications will surely cause date of hearing to be vacated. It will erode discipline in the hearing and disposal of appeals before the courts and a backlog will begin to be created again.

(iv) The passages reproduced above show the emails were available to the appellant well before 10 October 2012. It appears to be presented that there was reluctance by the

previous solicitor to issue the emails. If true, it only affects the value that may be placed upon such emails. But more to the point the Memorandum of Appeal filed on 14 August 2012 stated:

> ... Malah, kecuaian tersebut diakui sendiri oleh Peguamcara Perayu melalui email mereka kepada Perayu bertarikh 8/8/2012 setelah Perayu berungkali (sic) meminta Peguamcara Perayu yang terdahulu tersebut memberikan penjelasan atas keputusan Yang Arif Hakim tersebut.

(v) The fact that no civil action was undertaken against such solicitor throws much doubt upon the value of the emails for the purposes of consideration.

(vi) The application at encl. 8a sought to admit written submissions dated 10 May 2012 of the respondent. But these written submissions, we note, were already in the Record of Appeal at RR:49-59. The appellant acknowledged it was challenged by the respondent's counsel as "dokumen palsu dan tidak pernah wujud". Such challenge cannot be resolved by affidavits.

[18] Accordingly, we dismissed the application with costs.

The Appeal

[19] On the appeal itself, the respondent raised the objection that the record of appeal filed in this appeal should be struck out and the appeal be dismissed on the grounds that:

(i) The draft record of appeal had never been served upon the respondent's counsel before it was filed;

(ii) Respondent's counsel had never prepared, served, filed or used the purported written submission dated 10 May 2012 as shown at RR:49-59; and

(iii) Respondent's counsel had filed only one written submission dated 10 May 2012 and this is shown at RR:60-72.

[20] The record of appeal now before this court was not served upon the respondent's counsel before filing it. We observed that the purported respondent's written submission sought to be admitted through encl. 8a is only part of the record of appeal.

Allowing encl. 8a would not have remedied non service of the draft record of appeal before it was filed. Such failure is a fundamental threat to the reliability of records of appeals before the appellate courts that it cannot be countenanced under any circumstances. Such defect is, therefore, fatal to the record of appeal. Without a record of appeal filed, the appeal is fundamentally defective.

[21] We considered whether the defect is curable. It is provided in r. 3A of the Rules of the Court of Appeal 1994 that:

> 3A Preliminary objection on the ground of non-compliance shall not be allowed.
>
> A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[22] In principle, r. 3A is similar to O. 1A of the Rules of the High Court 1980. If there is any misconception that O. 1A, and therefore r. 3A is *panacea* to non compliance with the rules of court, it has been decisively dismissed in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 FC where the Federal Court held at para. 50 of the judgment that:

> As I had mentioned in court, if O. 1A is sought to be invoked whenever a party fails to comply with any provision of the rules, then the whole of the Rules of the High Court 1980 would be rendered useless. For example, can failure to enter appearance or file defence within the specified period be considered as an irregularity? Of course it cannot be. A party who is late in filing the relevant papers must obtain an order from the court to extend the time, if such extension is required and is permitted by the Rules. Therefore, the answer to question two is in the negative.

[23] There is, in this case, no application for leave to file the record of appeal out of time. There is, therefore, nothing placed before us to consider in that direction.

[24] We were not unaware that this potentially leaves the appellant, assuming there is merit in her case, without remedy and an injustice. But this is only true if there is merit in her originating motion. Hence, it is mere speculation. Neither the High Court at

the time of the originating motion nor this court in the appeal herein can possibly know in which direction the merits lay before hearing. Both courts can only determine where merits and justice lay after each respectively had read the application, all the documents required and put before the court in accordance with law, the submissions and heard any oral submissions. But the record of appeal in the first occasion was incomplete and in the second occasion, the record of appeal in the Court of Appeal suffered from the fundamental defect of the draft not having been served upon the respondent and containing a submission denied to have been made or used by the respondent's counsel. It was not made possible to show where the merits and therefore justice lay.

[25] The submissions for the appellant before us is that because of the injustice occasioned to the appellant by the negligence or mistake of her previous solicitor, the High Court ought to have adjourned the case, allowed new counsel to be appointed, accorded enough time to rectify the originating motion and then proceed to hear it on its merits, because the appellant ought not suffer from the negligence of her previous solicitor.

[26] Again, the logic follows that there is injustice occasioned by her previous solicitor's negligence or mistake only if the merits lay in her direction. And without a properly reliable record, it is impossible to determine that. Alternatively, if the merits did not lie in her direction, she cannot be said to have suffered from her previous solicitor's negligence or mistake.

[27] It is generally accepted that a client should not suffer from the negligence or mistake of the solicitor. But it first requires to be established that the negligence or mistake is the act of the solicitor. Otherwise, it will become common practice to obtain a second bite of the cherry by changing counsel, and blaming the errors in the first action upon the previous solicitor, without any civil suit being commenced and maintained against that previous solicitor. It would make a mockery of the system of justice.

[28] In this case, we note this saga commenced with the appellant's complaint to the disciplinary board that the respondent, a solicitor in Messrs Khairil & Co appointed to defend her in the High Court at Shah Alam Originating Summons MT3-24-1872-2008, had committed various misconduct. Unhappy with the

dismissal of the complaint by the disciplinary board, the appellant appealed to the High Court by way of an Originating Summons in Usul Pemula No. 25-10-01-2012, through Tetuan Adnan Sharida & Associates. Unhappy with the dismissal of that originating summons, the appellant filed a notice of appeal through Tetuan Adnan Sharida & Associates. The Memorandum of Appeal in the Court of Appeal was filed on 14 August 2012 through the present solicitors Tetuan Noorazmir Khadijah & Associates, placing blame upon Tetuan Adnan Sharida & Associates for the failure to comply with rr. 4 & 5, but without commencing any litigation against the solicitor. Now before us, we find that the record of appeal suffered from a fundamental defect.

[29] It is trite that in a solicitor and client relationship, the client is the principal and the solicitor is the agent. In the law of agency, the principal is bound by the actions of his chosen agent within the scope of that appointment. In our view, the principles of finality in litigation and that the solicitor is the agent of the client must mean that the general principle that a client should not suffer from the negligence or mistake of his solicitor is confined to a limited application where the injustice is one that cannot be remedied by an action against the errant solicitor. Otherwise, to obtain a second bite of the cherry all a litigant has to do is to appoint new solicitors, and blame the causes of dismissal of an appeal, claim or defence upon the previous solicitors. Of course that cannot be right.

[30] In the event, we dismissed the appeal with costs.